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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 1170

THOMAS W. SULLIVAN,

Appellant

vs.

ALABAMA STATE BAR,
a corporate body;

BOARD OF COMMISSIONERS
OF THE ALABAMA STATE BAR;

SAM W. PIPES, as
president, Alabama State Bar,
and as president, Board of
Commissioners of the Alabama
State Bar;

JOHN B. SCOTT, as secretary-
treasurer, Alabama State Bar;
and

WILLIAM H. MORROW, JR., as
general counsel, Alabama State
Bar,

Appellees

JURISDICTIONAL STATEMENT

FRED BLANTON, JR., ESQ.,
Suite 1627
Twenty-One Twenty-One Building
Birmingham, Alabama 35203

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IN THE

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No.

THOMAS W. SULLIVAN, *Appellant*

vs.

ALABAMA STATE BAR,
a corporate body,
et al.,

Appellees

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the United States District Court, Middle District of Alabama, Northern Division, as a three-judge court, has not been reported.

A copy of the opinion of the court is annexed hereto as Appendix A commencing at Page A1.

GROUNDS ON WHICH JURISDICTION IS INVOKED

1. *The nature of the proceeding*: Appellant, Thomas W. Sullivan, then a member of the Bar of the State of Ala-

bama, filed a civil action in the United States District Court, Middle District of Alabama, Northern Division, seeking to enjoin permanently the defendants Alabama State Bar, its governing body, and its officers from continuing to function under the authority of the present statutes of the State of Alabama pertaining to the organization of the Alabama State Bar, it being the position of appellant that the Board of Commissioners of the Alabama State Bar, the governing body of the Bar, is elected in violation of the equal protection clause of the Fourteenth Amendment, Constitution of the United States, and that the president of the Alabama State Bar is elected in violation of the equal protection and due process clauses, Constitution of the United States. This is an appeal from the order, judgment and decree of the three-judge United States District Court dismissing the complaint on the motion of these appellees.

2. *The order, judgment and decree sought to be reviewed* was dated and entered on February 4, 1969, and is embodied in the opinion of the United States District Court, Middle District of Alabama, Northern Division, annexed hereto as Appendix A. The notice of appeal to this court was filed in the United States District Court, Middle District of Alabama, Northern Division, on February 28, 1969.

3. *The statutory provision believed to confer on this Court jurisdiction* of the appeal is Title 28, United States Code, Section 1253.

4. *Cases believed to sustain jurisdiction*: *Baker v. Carr*, 369 U.S. 186; *Reynolds v. Sims*, 377 U.S. 533; *Avery v. Midland County, Texas*, 390 U.S. 474; *Smith v. Allwright*, 321 U.S. 649.

5. *State statutes whose validity is involved*:

Title 46, Section 22, Code of Alabama, 1940: "§22. Selection of commissioners. - *The board of commissioners (of the Alabama State Bar) shall be selected by the members of the state bar, who shall vote by ballot. Each judicial circuit of the State of Alabama shall be entitled to a commissioner on said board of commis-*

sioners, and no judicial circuit shall have more than one commissioner, provided, however that nothing contained in this article shall prohibit the election of a president of the state bar as hereinafter in this article provided for at an annual meeting of the state bar, who shall be a bona fide resident of any judicial circuit of this state, and who shall be ex-officio president of the board of commissioners in case he is not already a member of said board. *If hereafter additional judicial circuits are constituted, such additional circuits shall be entitled to a commissioner on said board.* The ballots shall be deposited in person or by mail with the secretary of the board or such other officer as it may designate. There shall be an annual election for the purpose of selecting successors to the commissioners whose terms expire. The board shall prescribe rules and regulations in regard to such annual elections not in conflict with the provisions of this article. The board shall in accordance with its rules, give at least sixty days' notice of the time for holding the election each year. *The commissioners for the respective judicial circuits shall be elected by the members of the bar of the respective circuits,* voting by ballot in the annual election hereinabove provided for. Such annual election shall be held on the first Tuesday in June of each year and continue for one week. The term of each commissioner shall be three years from July first following his election." (Emphasis supplied)

Title 46, Section 24, Code of Alabama, 1940, as amended: "§24. Annual meeting of the state bar.- *There shall be an annual meeting of the lawyers of Alabama, open to all members of the state bar in good standing, to be held at such time and place as the board of commissioners shall designate. At such annual meeting a president and a first vice-president of the state bar shall be elected by a majority vote, by ballot, by members of the state bar present and voting. The election must be had only upon nominations made by members of the state bar from the floor in said annual session of the state bar.* The members so elected presi-

dent and first vice-president, respectively, shall serve exofficio as president and first vice-president, respectively, of the board of commissioners, and shall discharge the duties imposed in this chapter on such president and first vice-president, respectively; they shall be reimbursed for their expenses as are elected members of the board, and may attend at all meetings of the board, including executive sessions thereof; but shall not vote as members of the board, unless they are members by election thereto under the provisions of section 22 of this title, except that the president, or the first vice-president if serving in his stead, may vote in case of a tie. The president and first vice-president shall assume office at the annual meeting during which they are elected, and each shall hold office until his successor is elected at the next annual meeting of the state bar; the president shall not be eligible to succeed himself as president. The president shall preside at all meetings of the board and of the state bar. In case of death, absence or disability of the president, his duties shall be discharged by the first vice-president until his successor be elected as herein provided for. In case of the death, absence or disability of the first vice-president, his duties shall be discharged by a vice-president to be selected by the board of commissioners until his successor be elected as herein provided for. At the same place, and immediately following the adjournment of the annual meeting of the state bar, the board of commissioners shall hold its regular annual meeting and shall elect a secretary, who need not be a member of the board, and such other officers and agents as the board may deem appropriate, all of whom shall hold office at the pleasure of the board and shall be subject to removal without cause by the board at any time. The secretary shall be the only paid officer of the board, and shall be paid a salary to be fixed by the board." (Emphasis supplied)

QUESTIONS PRESENTED

1. Whether Title 46, Section 22, Code of Alabama, 1940, which provides that each judicial circuit in the State

of Alabama shall elect one commissioner to the board of commissioners of the Alabama State Bar, the governing body of the Bar, is repugnant to the equal protection clause of the Fourteenth Amendment, Constitution of the United States, where members of the Bar are taxed or licensed by the State of Alabama for the exclusive benefit of the Bar, and where there is a wide disparity in the number of members of the Alabama State Bar among the judicial circuits.

2. Whether Title 46, Section 24, Code of Alabama, 1940, as amended, which provides that in order to vote for the president of the Alabama State Bar a member of the Bar must travel to the site of the convening of the annual meeting, which meetings are held in widely separated cities in the State of Alabama often far removed from the place of practice or place of residence of many, if not most, of the members of the Bar, is repugnant to the equal protection and due process clauses of the Fourteenth Amendment, Constitution of the United States.

STATEMENT OF THE CASE

Appellant filed a complaint for a permanent injunction against the Alabama State Bar, its governing body, and its various officers in the United States District Court, Middle District of Alabama, Northern Division. The complaint alleges that the plaintiff is a member in good standing of the Alabama State Bar, with his most recent place of practice of the legal profession being in Montgomery, Montgomery County, Alabama.

Plaintiff alleges that the Board of Commissioners of the Alabama State Bar, which is the governing body of the Bar, is and has been unconstitutionally constituted in that there has been since 1923 an invidious disparity in the number of members in good standing of the Alabama State Bar, as well as the total population, within the thirty-six (36) judicial circuits of the State of Alabama, each of which judicial circuits is entitled to a commissioner on the Board of Commissioners elected by the lawyers in good standing within the judicial circuit. Title 46, Section 22, Code of Alabama, 1940, *supra*.

Plaintiff further alleges facts showing that for fiscal year 1965-66 there were approximately 1870 revenue licensed members of the Alabama State Bar; that the Thirty-fourth Judicial Circuit, Franklin County, with a total population of 21, 988, according to the latest federal census, had ten (10) attorneys licensed; that the Fifteenth Judicial Circuit, Montgomery County, with a total population of 169,-210, had 209 attorneys licensed; and that the Tenth Judicial Circuit, Jefferson County, with a total population of 634,834, had 612 attorneys licensed.

Sullivan avers that the Board of Commissioners exercises administrative, legislative and judicial powers in the performance of its duties, as delineated by the legislature of the State of Alabama in Title 46, Section 25, Code of Alabama, 1940.

Plaintiff moreover alleges that the State of Alabama imposes a license or occupational tax upon him and every other attorney by Title 51, Section 460, Code of Alabama, 1940, as amended, before he is eligible to engage in the practice of law in the State of Alabama, and all or a part of that license or occupational tax constitutes a separate fund in the treasury of the State of Alabama which is disbursed on the order of the Board of Commissioners of the Alabama State Bar; and, payment of this license or occupational tax is a pre-requisite to appellant's voting for officers of the Alabama State Bar, as provided for in Title 46, Section 30, Code of Alabama, 1940.

Plaintiff then states in his complaint that Title 46, Section 24, Code of Alabama, 1940, *supra,* imposes the condition that after paying the required license or occupational tax to the State of Alabama he must travel to the site of the annual convention to vote for president of the Alabama State Bar. Annual conventions have been held in Huntsville, Mobile, Tuscaloosa, and Birmingham, each of which is a great distance from his residence and place of practice. Conventions have been held in Montgomery.

Plaintiff concludes: (1) That he is being denied the equal protection of the laws by the aforesaid invidious disparity in the number of members of the Alabama State Bar and in total population within the thirty-six (36) judicial circuits of the State of Alabama; and (2) That he is being denied the equal protection of the laws and due process in being required to travel great distances to exercise his franchise to vote for the president of the Alabama State Bar.

The Alabama State Bar, its Board of Commissioners, and its officers filed a motion to dismiss the complaint, which was granted.

Inter alia, the three-judge court below held that the "constitutional principle of 'one man, one vote' has no relevancy to the Board of Commissioners of the Alabama State Bar," and that the attack on the requirement of being compelled to travel to exercise his franchise in electing a president of the Alabama State Bar did not present a substantial constitutional question.

SUBSTANTIALITY OF FEDERAL QUESTIONS

Question 1

The basic facts as alleged in the complaint cannot be disputed. The three-judge court stated:

> "There can be little or no dispute about the pertinent basic facts as disclosed by the complaint. The Board of Commissioners of the Alabama State Bar was first established in 1923. The members in good standing of the Alabama State Bar in each judicial circuit of the State select one member of said Board of Commissioners. Sec. 22. Thus, there are 36 State judicial circuits and 36 members of the Board of Commissioners. There are wide variances among the judicial circuits both in total population and in the number of licensed lawyers."

The Supreme Court of Alabama has ruled recently on this question of disparity in *In the Matter of Thomas W.*

Sullivan, (Re: Thomas W. Sullivan v. Board of Commissioners of Alabama State Bar), MSS, 3rd Division 277, decided January 30, 1969, rehearing denied March 6, 1969;

> "***It is petitioner's contention that since each judicial circuit elects one commissioner, and some circuits have a relative few members of the bar, while others have a large number of members, the composition of the Board is malapportioned and violates the 'one man one vote rule.'
>
> "We have considered the cases cited by appellant in support of his contention above set out, particularly *Baker v. Carr,* 369 U.S. 186, 82 Sup. Ct. 691, 7 L. Ed 2d 663; *Reynolds v. Sims,* 377 U.S. 533, 84 Sup. Ct. 1362, 12 L. Ed. 2d 506; *Ellis v. Baltimore,* 234 Fed. Supp. 945, and others.
>
> "We do not consider that the doctrines announced in this line of cases were intended to apply to an association of a professional group, even though organized under the aegis of legislation, but were intended to apply to political governing bodies in the classical sense.
>
> "The organization of the Bar for the governing of the legal profession, and the administration of its duties is a matter peculiarly within the province of the Alabama Bar. We hold that the method of electing the Board of Commissioners is in no wise invalid."

Furthermore, in Ex parte *Griffith,* 278 Ala 344, 178 So2d 169, the Supreme Court of Alabama denominated the Alabama State Bar as a private professional organization, which is apparently the basis for the foregoing decision. A study of the several states and their Bar organizations indicates Alabama probably stands alone among the states with an integrated Bar as to a governing body standing in no relation to the lawyers represented. Thus, appellant does not question the concept of an integrated bar *per se.*

Nonetheless, the fact remains that the State of Alabama extracts a license tax from each attorney before he

can engage in the practice of law. Title 51, Section 460, Code of Alabama, 1940, as amended. All of this tax of $50.00 constitutes a separate fund which is disbursed by the comptroller of the State of Alabama on order of the Board of Commissioners of the Alabama State Bar. In conjunction with this license tax, Title 46 Section 30, Code of Alabama, 1940, provides: "No attorney who is in default of the payment of such annual license shall be recognized in courts of Alabama, or in the voting or transacting of business by the state bar as being in good standing until he has paid the required annual license."

Furthermore, the Board of Commissioners, in Title 46, Section 25, Code of Alabama, 1940, is given, among other powers, the power "(f) To make rules and by-laws not in conflict with any of the terms of this chapter concerning the selection and tenure of its officers and committees and their power and duties, and generally for the control and regulation of the business of the board and of the state bar."

Notwithstanding the labelling of the Alabama State Bar as a private professional organization by the Supreme Court of Alabama, it is evident it is an arm of the State of Alabama. It is further apparent that the Board of Commissioners exercises rule-making power within the framework of its delegated authority, which function is legislative. It would appear that this rule-making power is the primary reason for the existence of the board since it directs the various activities of the Alabama State Bar. It is to be hoped, certainly, that its judicial duties in disciplinary matters are but a minor part of its delegated functions.

These factors are then present: (1) Attorneys are required to pay to the State of Alabama a license tax to practice; (2) Payment of such tax is a prerequisite to participating in the affairs of the Alabama State Bar; (3) The Board of Commissioners directs the expenditure of that portion of the license tax which inures to the Alabama State Bar; (4) A wide disparity both in total population and licensed attorneys among the judicial circuits of Alabama is

admitted; (5) The Alabama State Bar is an arm of the State of Alabama.

The question thus raised is vital as regards the outer limits of the principle of *Baker v. Carr, supra,* and *Reynolds v. Sims, supra,* as extended by *Avery v. Midland County, Texas, supra.* It is contended that the "one man, one vote" doctrine logically should be extended to other arms of the state, especially where that arm exercises state-wide jurisdiction, and particularly where members of that arm are taxed; their voting on representatives in that arm is conditioned upon the payment of the tax, and those representatives have power to make rules and regulations and expend monies.

Avery was concerned with fragmentation of state legislative power on a geographical basis, *i.e.,* the county. In this instance, the fragmentation of legislative power has progressed on a selective population basis, *i.e.,* lawyers within the geographical confines of the entire state. It is submitted there is not that difference present which would preclude the application of *Avery* to the Alabama State Bar.

The case of *Sailors v. Board of Education,* 387 U.S. 105, cited by the lower court, is not controlling. There, as appellant reads this Court's opinion, the determining factor for non-application of the "one man, one vote" doctrine was the fact there was not an election involved. In this case there is definitely an election involved.

The facts demonstrating malapportionment here are utterly appalling. The Tenth Judicial Circuit of Alabama, (Birmingham and Bessemer, Jefferson County), with approximately one-third of the revenue licensed attorneys in the State of Alabama has one (1) commissioner out of thirty-six (36). These tax-paying lawyers in the Tenth Judicial Circuit, and they are forced to contribute by the legislature of Alabama the sum of Fifty Dollars ($50.00) a year to the Alabama State Bar, should and ought to have about twelve (12) members of the Board of Commissioners as presently constituted. Certainly, there exists no overwhelming reason for tying the Bar in with the Bench to this de-

gree, and other methods of electing Bar commissioners could and would alleviate the apparent and invidious disparity. Judicial circuits are erected because of local conditions; the Alabama State Bar is statewide. If the equal protection clause is to have its ultimate vitality then this question poses the federal constitutional issue squarely.

Question 2

The lower court had this to say about the burden placed on an attorney by forcing him to travel to the scene of the annual meeting to exercise his franchise for election of the president of the Alabama State Bar:

> "Sullivan's attack on Section 24 does not, in our opinion, present a substantial constitutional question. It is elementary that the equal protection clause of the Fourteenth Amendment is aimed only at unreasonable or invidious differences. The presumption is that discriminations in state legislation are based on adequate grounds. In the light of all the advantages which flow from a face-to-face discussion of the many problems confronting the organized bar, the Alabama Legislature clearly acted within its constitutional power in requiring an annual meeting of the integrated State Bar for the purpose of electing a president and vice-president."

It is difficult for appellant to equate a face-to-face discussion of Bar problems with the exercise of the right to vote for Bar officers. Appellant would show on a hearing of this matter the actual registration of Bar members at the various conventions, and it is submitted that the evidence would demonstrate that only a minority of the members attend annual meetings. Besides, the point advanced is that because an attorney cannot afford to travel from, for example, Montgomery to Huntsville because of financial or other reasons to attend a Bar meeting is no reason to deny him the right to vote for president of the Bar. This attorney has paid his $50.00, and should be privileged to vote in some fashion; for example, at the courthouse of the county of his practice or residence, or by mail. *Smith v. Allwright,*

321 U.S. 649, 664, condemns the denial of rights by indirection.

As a matter of fact, some lawyers go to a Bar meeting solely to hear an address by a Justice Black or a Percy Foreman; others find the conviviality of the various hospitality rooms more intriguing than a discussion of the Uniform Commercial Code. This is well and good, but sight is being lost of the fact that many others might wish to attend and vote but cannot because of the burden of travel, and resulting loss of time from practice or other matters.

Once it is granted that the Alabama State Bar is an arm of the State of Alabama then the legislature cannot impose such conditions upon the exercise of the franchise consistent with the equal protection and due process clauses of the Fourteenth Amendment, Constitution of the United States.

CONCLUSION

It is submitted that the discussion above demonstrates that the questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution.

Respectfully,

FRED BLANTON, JR.
Suite 1627
Twenty-One Twenty-One Building
Birmingham, Alabama 35203

Attorney for Appellant

A1

IN THE

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF ALABAMA

NORTHERN DIVISION

THOMAS W. SULLIVAN, *Plaintiff,*

vs.

ALABAMA STATE BAR, a corporate body, ET AL., Defendants.

Civil Action No. 2820-N

ON MOTION TO DISMISS AND FOR JUDGMENT ON THE PLEADINGS

Before RIVES, Circuit Judge, and JOHNSON and ALLGOOD, District Judges.

PER CURIAM:

This cause is submitted on a motion to dismiss and for judgment on the pleadings filed by the Chief Justice and Associate Justices of the Supreme Court of Alabama and on a like motion filed by the Alabama State Bar, its Board of Commissioners and officers.

There can be little or no dispute about the pertinent basic facts as disclosed by the complaint. The Board of Commissioners of the Alabama State Bar was first established in 1923.[1] The members in good standing of the Alabama State Bar in each judicial circuit of the State select one member of said Board of Commissioners. Sec. 22. Thus, there are 36 State judicial circuits and 36 members of the Board of Commissioners. There are wide variances among the judicial circuits both in total population and in the number of licensed lawyers.

At an annual meeting of the lawyers of Alabama held at such place and time as the Board of Commissioners designate and open to all members of the State Bar in good

[1]Code of Alabama. of 1940, Recompiled 1958, Tit. 46, §21, et seq. Later references to that statute will be simply to the pertinent section of Title 46.

standing, a president and a first vice-president of the State Bar are elected by majority vote by the members of the State Bar present and voting. Sec. 24. Broad powers and authority are conferred on the Board of Commissioners, including the following:

> ". . . (c) subject to the approval of the supreme court, to formulate rules governing the conduct of all persons admitted to practice, and to investigate, or cause to be investigated, and to pass upon, all complaints that may be made concerning the professional conduct of any person who has been, or may hereafter be, admitted to the practice of the law; (d) subject to the approval of the supreme court, to formulate rules governing the reinstatement of members of the bar who have been disbarred, and to pass upon all petitions for re-instatement; (e) to appoint one or more committees from the membership of the board, or from the membership of the entire bar, or partly from one and partly from the other, to take evidence in connection with any complaint filed against any attorney and forward the same to the board . . . The board shall administer such discipline, by public or private reprimand, suspension from the practice of law, or exclusion and disbarment therefrom, as the case shall, in their judgment, warrant. A majority of the board shall constitute a quorum and the majority of those present (if a quorum be present) shall be empowered to act as and for the entire board. The supreme court may, and on petition of the party aggrieved must, in any case of suspension or disbarment from practice, review the action of the board, and may, on its own motion, and without the certification of any record, inquire into the merits of the case and take any action agreeable to their judgment." Sec. 25 (c), (d) and (e).

In May and June 1964, the Grievance Committee of the Alabama State Bar preferred charges against the plaintiff Sullivan, alleging violations of specified rules theretofore formulated by the Board and approved by the Supreme

Court. Additional charges against Sullivan were preferred in 1966. On March 3, 1967, the Board of Commissioners found Sullivan guilty of certain of the charges and ordered his disbarment. Sullivan filed a petition in the Supreme Court of Alabama for certiorari and for a stay of execution of the judgment of disbarment. On March 13, 1967, the Supreme Court of Alabama entered the following order:

"Petitioner, having filed in this Court on March 7, 1967, a Petition for Certiorari directed to the Board of Commissioners of the Alabama State Bar to forward to this Court a full and complete record of proceedings in this case and to review, revise, reverse and hold for naught that certain judgment of disbarment rendered by the Board of Commissioners of the Alabama State Bar on, to-wit: the 3rd day of March, 1967, and Petitioner having filed a petition for stay of the execution of said judgment of disbarment pending this Court's determination of the matters to be presented, and said petition being duly submitted and examined and understood by the Court, it is ordered that the petition for stay be and the same is hereby denied;

"Provided, however, that upon the Petitioner filing in this Court within ten days from this date a sworn affidavit stating that pending the disposition of this matter in this Court he will not, directly or indirectly, either by himself or in association with another, act or appear as solicitor for complainant or respondent in any divorce proceedings now pending or hereafter filed, a stay of the order of disbarment of the Board of Commissioners of the Alabama State Bar will issue.

"Done this 13th day of March, 1967.

"Livingston, C.J., Lawson, Goodwyn, Merrill & Harwood, J.J., concur.

"Simpson and Coleman, J.J. would grant a stay of execution of the judgment of disbarment, pending review of the same, without condition as has heretofore been done in disbarment proceedings."

Sullivan's petition for reconsideration was ordered stricken. He unsuccessfully applied to the Honorable Hugo L. Black, Associate Justice of the Supreme Court of the United States for a stay of execution. Thereafter, he filed the prescribed affidavit, and the Supreme Court of Alabama, on April 3, 1967, issued the following order:

> "WHEREAS, on March 13, 1967, this Court did enter an order denying the stay of execution of the judgment of disbarment entered by the Board of Commissioners on March 3, 1967, and
>
> "WHEREAS, the order of March 13, 1967, did provide that a stay of execution would be granted provided the petitioner would not directly or indirectly either himself or in association with another act or appear as solicitor for complainant or respondent in any divorce proceeding now pending or hereafter filed, and
>
> "WHEREAS, petitioner did, on March 28, 1967, file an affidavit called for in the Court's order of March 13, 1967, and through his attorney has petitioned the Court to treat such affidavit as being timely filed in view of the fact that petitioner sought relief in the Supreme Court of the United States by petition, and said petition being denied by Mr. Justice Hugo L. Black on March 24, 1967.
>
> "NOW, THEREFORE, IT IS ORDERED that the judgment of disbarment entered by the Board of Commissioners on March 3, 1967, be and the same is hereby stayed pending the disposition of the PETITION FOR REVIEW in this Court."

The petition for review of Sullivan's disbarment was argued and submitted to the Supreme Court of Alabama in May 1968, and on January 30, 1969 that Court rendered its opinion and decision affirming the judgment of disbarment.

On November 15, 1968, before the disposition of the petition for review, the President of the Board of Commissioners and the General Counsel of the Alabama State Bar filed in the Supreme Court of Alabama a petition for an order to show cause why Sullivan should not be held in con-

tempt of court for participating in certain named divorce actions. On December 11, 1968, an order to show cause issued from the Supreme Court of Alabama and the date set for hearing was Wednesday, January 8, 1969.

On January 3, 1969, Sullivan filed his complaint in this Court praying for a restraining order, interlocutory injunction and permanent injunction restraining further prosecution or consideration of the contempt proceeding against Sullivan. On the same day; the district judge denied Sullivan's motion for a temporary restraining order. The contempt proceeding is now set for hearing before the Supreme Court of Alabama on February 24, 1969.

Sullivan injects federal constitutional questions by seeking an injunction restraining the enforcement of Sections 22 and 24 of Title 46 of the Code of Alabama. He claims that Section 22 violates the equal protection clause of the Fourteenth Amendment because of malapportionment of the Board of Commissioners arising from the wide disparity in population and in numbers of lawyers in the various State judicial circuits. He attacks Section 24 as denying the equal protection of the laws, because he and other lawyers are required to travel great distances and markedly different distances from their respective homes or places of practice in order to vote for a president and a first vice-president of the State Bar. Sullivan had made these same attacks as a part of his defense in the disbarment proceeding, and in affirming the judgment of disbarment the Supreme Court of Alabama ruled adversely to Sullivan on these questions.

In addition to individual relief as a defense to the contempt proceeding, Sullivan appears in this Court individually and as a champion of the entire State Bar - "on behalf of himself and all other members in good standing of the Alabama State Bar" and prays: "That in the event the constitutional deficiencies inherent in the Alabama State Bar as now constituted are not remedied forthwith that the Court proceed to correct the deficiencies."

The foregoing statement of this case has necessarily been disproportionately long, and its decision can be relatively brief.

28 U.S.C. § 2283 provides:

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."[2]

The Second Circuit[3] and the Fifth Circuit[4] apparently differ as to whether this statute is a clear cut prohibition or establishes only a rule of comity or judicial discretion. Under either construction, it is clear that this Court should not interfere by conjunction with the pending contempt proceeding in the Supreme Court of Alabama.[5] Proceedings to disbar attorneys from practice in the Alabama courts are peculiarly within the jurisdiction of the Supreme Court of Alabama, free from federal interference.[6]

Sullivan seems to take the position that this case is brought within one of the exceptions to 28 U.S.C. § 2283, quoted *supra,* viz.: ". . . where necessary in aid of its jurisdiction"; and that this Court should prevent or delay his disbarment so that he may continue this suit to correct the constitutional deficiencies which Sullivan claims to be inherent in the Alabama State Bar as now constituted.

There may be several inadequacies of this case as a class action under Rule 23, Fed.R.Civ.P. Certainly the "class" is not properly described as "all the members in good standing of the Alabama State Bar," for that includes the beneficiaries as well as the victims of the alleged dis-

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[2] *See* Dombrowski v. Pfister, 1965, 380 U. S. 479, 484 n. 2.

[3] Stevens v. Frink, 2 Cir. 1967, 372 F.2d 378, 381, 382.

[4] Southern California Petroleum Corp. v. Harper, 5 Cir. 1960, 273 F.2d 718; T. Smith & Son, Inc. v. Williams, 5 Cir. 1960, 275 F.2d 397; Wilworth v. Riner, 5 Cir. 1965, 343 F.2d 226.

[5] *See* Douglas v. City of Jeanette, 1943, 319 U.S. 157, 162; Zwickler v. Koota, 1967, 389 U.S. 241, 253; Cameron v. Johnson, 1968, 390 U.S. 611.

[6] *See* Theard v. United States, 1957, 354 U.S. 278, 281; Gately v. Sutton, 10 Cir. 1962, 510 F.2d 107.

crimination. It is doubtful whether a lawyer against whom disbarment proceedings are pending is a "representative party" who can be counted on to "fairly and adequately protect the interests of the class." Rule 23(a), Fed.R.Civ.P. Since these possible inadequacies have not been raised by the defendants, we will treat this as a proper class action for purposes of the present decision.

Assuming that Sullivan had standing either individually or as representative of a class to prosecute this action when the present complaint was filed, we would have some doubt as to whether that standing was lost by the Alabama Supreme Court's subsequent affirmance of the judgment of disbarment,[7] or will be lost by any judgment that may be entered by the Supreme Court of Alabama in the contempt proceeding.[8]

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[7]That affirmance does not conclude the litigation, for by supplemental brief Sullivan's counsel informs this Court: "It may be stated that a petition for rehearing shall be filed in the Supreme Court of Alabama within the fifteen (15) day period allowed by the rules of that Court." Of course review may also be sought from the Supreme Court of the United States.

[8]*See* Davis, *Standing: Taxpayers and Others*, 35 U. Chi. L.Rev. 611, 612 (Summer 1968); 3 Davis, Administrative Law Treatise §§ 22.01 - 22.18. That much is conceded in brief by the Alabama State Bar, its Board of Commissioners and officers:

"If this Court views plaintiff's constitutional challenge to the organization of the Bar Commission as raising a substantial question meriting review by this Court, or one which is inappropriate for judgment on the pleadings, we point out that Mr. Sullivan would have clear standing to raise this constitutional challenge as an attorney in the State of Alabama even if the Supreme Court of Alabama upheld his disbarment. This would be true because as a disbarred attorney, plaintiff Sullivan's interest in the Bar Association would not be merely academic. Under Title 46, § 25, Alabama Code, the Bar Commission is charged with formulating the rules governing the reinstatement of disbarred members of the Bar, subject to the approval of the Supreme Court. Also the Bar Commission is charged with the duty 'to pass on all petitions for reinstatement.' It thus seems clear that even if a member of the general public is viewed as lacking standing to challenge the constitutional formation of the Bar Commission, a disbarred lawyer would have such standing."

In any event a class action cannot be dismissed without the approval of the court and after notice of the proposed dismissal to all members of the class.[9] If that occurs, we cannot assume that every other member of the class will fail to intervene to correct "the constitutional deficiencies in the Alabama State Bar as now constituted," if in truth there be substantial grounds to believe that there are any such constitutional deficiencies. Thus Sullivan's continued presence as plaintiff is not shown to be "necessary" in aid of this Court's jurisdiction.[10] We conclude that this case does not come within any of the exceptions to 28 U.S.C. § 2283, and that this Court should not grant an injunction to stay the contempt proceedings in the Supreme Court of Alabama.

The appropriateness of declaratory relief rests in the sound discretion of this Court.[11] Out of an abundance of caution and from considerations of public policy, we will assume that Sullivan has properly invoked the jurisdiction of this Court and that, having done so, we are required to consider his federal constitutional claims.[12]

The Supreme Court of Alabama has held that in reviewing disbarment proceedings "this court is in the exercise of its original and inherent powers in the matter of disbarment of attorneys at law."[13] The powers conferred upon the Board of Commissioners of the Alabama State Bar are more judicial than legislative in nature. They were so treated by the Supreme Court of Alabama in the leading case of *Ex parte Thompson,* 1933, 152 So. 229, 238, 239:

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[9]Rule 23 (e), Fed.R.Civ.P.

[10]28 U.S.C. § 2283.

[11]Eccles v. Peoples Bank of Lakewood Village, Calif., 1948, 333 U.S. 426; Zwickler v. Koota, 1967, 389 U.S. 241.

[12]*See* England v. Louisiana Medical Examiners, 1964, 375 U.S. 411, 415.

[13]*Ex parte* Denson, Ala. 1938, 178 So. 484.

"We will now address ourselves to a consideration of the question whether the Legislature of Alabama acted within constitutional bounds in creating the board of commissioners of the state bar, and in conferring upon it the powers enumerated in the act. No doubt it was attempted to confer upon the board thus created powers highly judicial in nature. This board is given authority to formulate rules governing the conduct of all persons admitted to practice and to investigate and pass upon all complaints that may be made concerning the professional conduct of any persons who has been or who may hereafter be admitted to the practice of the law, and to formulate rules governing the reinstatement of members of the bar who have been disbarred and to pass upon all petitions for reinstatement. The board is empowered to provide for the taking of evidence, and, on hearing of any complaint against an accused attorney, in all cases in which the evidence, in the opinion of a majority of the board, justifies such a course, they are required to take such disciplinary action by public or private reprimand, suspension from the practice of law, or exclusion and disbarment therefrom, as the case shall in their judgment warrant, provided that in cases of exclusion and disbarment a majority of the board shall vote affirmatively before the exclusion and disbarment shall become effective. But the rules and regulations which may be formulated and adopted by the board shall not become effective until the same shall have received the approval of this court, and the right of this court to approve or disapprove all or any part of the rules so formulated and adopted by the board is fully reserved to this court. More than this, this court is expressly given the right to review on petition of party aggrieved, the action of the board, *and may, on its own motion, and without the certification,* inquire into the merits of the case, and take *any action* agreeable *to their judgment.* If this court should desire it, additional testimony may be taken.

"Section 139 of the Constitution, as presently pertinent, reads:

" 'The judicial power of the state shall be vested in the senate sitting as a court of impeachment, a supreme court, circuit courts, chancery courts, courts of probate, such courts of law and equity inferior to the supreme court, and to consist of not more than five members, as the legislature from time to time may establish, *and such persons as may be by law invested with powers of a judicial* nature. * * *' (Italics supplied.)

"Thus we find express constitutional warrant for conferring upon *this board* judicial functions; and this conclusion is supported by the decision of this court in the case of State Tax Commission v. Bailey & Howard, 179 Ala. 620, 60 So. 913. We fail to see, in the creation of the board of commissioners of the state bar with the powers conferred, any transgression of constitutional bounds by the Legislature, and, as for any constitutional objections assigned, and here argued, we hold that the act does not violate any of the provisions of the Constitution urged and assigned by appellant."

Thus it appears that the State Supreme Court, in the exercise of its original and inherent powers in disbarment proceedings, can remedy any errors committed by any claimed malapportionment of the Board of Commissioners. Moreover, assuming any such malapportionment to exist, the acts of the Board of Commissioners are nonetheless acts of a de facto authority and valid.[14]

[14]Cassius Marsellus Clay, Jr. v. United States, 5 Cir. 1968, 397 F.2d 901; Nelloms v. United States, 5 Cir. 1968, 399 F.2d 295; Sellers v. McNamara, 5 Cir. 1968, 398 F.2d 893; Simmons v. United States, 5 Cir. 1969, —— F.2d —— [No. 25371, decided Jan. 9, 1969]; Schaefer v. Thomson, D. Wyo., 251 F. Supp. 450, 453, *aff'd,* Harrison v. Schaefer, 1966, 383 U.S. 269; Ryan v. Tinsley, 10 Cir. 1963, 316 F.2d 430, 432; Dawson v. Bomar, 6 Cir. 1963, 322 F.2d 445; Horton v. Bomar, 6 Cir. 1964, 335 F.2d 583; Sims v. Frink, M.D. Ala. 1962, 208 F.Supp. 431, *aff'd,* Reynolds v. Sims, 1964, 377 U.S. 533; Fortson v. Morris, 1966, 385 U.S. 231, 235.

Finally, this case might be more briefly and properly disposed by laying aside all procedural obstacles and deciding Sullivan's federal constitutional claims. He asks this Court to extend the "one man, one vote" requirement far beyond the holdings of the Supreme Court in *Reynolds v. Sims,* 1964, 377 U.S. 533, and *Avery v. Midland County, Texas,* 1968, 390 U.S. 474, 88 S.Ct. 1114. The Supreme Court has held that the "one man, one vote" principle has no relevancy to the choice of members of a county school board, a non-legislative office.[15] Lower courts have reached the same result as to various governing bodies of limited-purpose districts and as to members of the executive or judicial branch.[16] As has been indicated, the powers of the Board of Commissioners here under attack may more accurately be classed as judicial than as legislative. If there is any unjust malapportionment, it can be corrected by the State Legislature, which itself is no longer afflicted with the malady of malapportionment.[17] We hold that the constitutional principle of "one man, one vote" has no relevancy to the Board of Commissioners of the Alabama State Bar.

Sullivan's attack on Section 24 does not, in our opinion, present a substantial constitutional question. It is elementary that the equal protection clause of the Fourteenth Amendment is aimed only at unreasonable or invidious differences.[18] The presumption is that discrimination in state legislation are based on adequate grounds.[19] In the light of

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[15]Sailors v. Board of Education, 1967, 387 U.S. 105, 111.

[16]*See* Annotation on Applicability of "One Man - One Vote" Rule, 18 L.ed. 2d 1537, 1541, 1543.

[17]*See* Sims v. Frink, M.D. Ala. 1962, 208 F.Supp. 431, *aff'd,* Reynolds v. Sims, 1964, 377 U.S. 533; Sims v. Baggett, M.D. Ala. 1965, 247 F.Supp. 96.

[18]Lindsley v Natural Carbonic Gas Co., 1911, 220 U.S. 61.

[19]Middleton v. Texas Power & Light Co., 1919, 249 U.S. 152, 157; Madden v. Kentucky, 1940, 309 U.S. 83.

all of the advantages which flow from a face-to-face discussion of the many problems confronting the organized Bar, the Alabama Legislature clearly acted within its constitutional power in requiring an annual meeting of the integrated State Bar for the purpose of electing a president and vice-president.

Accordingly, it is the order, judgment and decree of this Court that each of the motions of the defendants to dismiss be and the same is hereby granted, and the complaint is hereby dismissed. The costs are taxed against the plaintiff.

Done this the 4th day of February 1969.

s/Richard T. Rives
United States Circuit Judge

s/Frank M. Johnson, Jr.
United States District Judge

s/Clarence W. Allgood
United States District Judge